LAGENDA KENCANA SDN BHD A

v.

PETER'S HOLDINGS SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
RAMLY ALI JCA
LINTON ALBERT JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: B-02(IM)-2379-2010]
18 AUGUST 2011 C

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside consent order - Whether court in appropriate circumstances may set aside a sealed and perfected consent order - Whether appellant seriously prejudiced - Whether consent order set aside to prevent grave injustice to appellant* D

CIVIL PROCEDURE: *Solicitor - Change of solicitors - Failure to file notice of change of solicitors - Whether solicitors had locus standi to represent appellant - Rules of the High Court 1980, O. 64 r. 1 - Non-compliance - Whether a mere irregularity - Whether compliance mandatory* E

The appellant filed an action against the respondents claiming damages for, *inter alia*, breach of duty of care and trespassing. On 20 January 2009, the firm of solicitors, Messrs Scott & Kuhan, F acting on behalf of the appellant, was dissolved and the lawyer handling the matter in that firm, one J Jeyakuhan has since practiced in a new firm Messrs Rastam Singa & Co. When the case came up for trial on 8 July 2009, Jeyakuhan, who claimed to still be acting on behalf of the appellant, informed the court that G both parties had agreed for the appellant to withdraw the case. The appellant, however, contended that it had never given any instruction or authority to Jeyakuhan or Messrs Rastam Singa & Co to act on its behalf and to withdraw the action with liberty to file afresh. The appellant further claimed that Messrs Rastam & H Singa was never appointed by the appellant and the said firm had never filed any notice of change of solicitors to act for the appellant in the said action. The appellant submitted that the withdrawal of the appellant's claim would severely prejudice the appellant as the appellant would not be able to refile the claim I afresh against the respondents on the ground that the cause of action in tort would be statute-barred as its six years limitation

A period had lapsed. The appellant then appointed a new firm of solicitors, Messrs Sidek Teoh Wong & Dennis to act on its behalf and filed an application in order to set aside the said consent order. The High Court in dismissing the appellant's said application found that the knowledge of the solicitors was the B knowledge of the client, *ie*, the appellant in this case; therefore the learned judge found that the appellant's averment that it had no knowledge of the consent order could not stand. The appellant thus appealed.

C **Held (allowing the appeal with costs)**
Per Ramly Ali JCA delivering the judgment of the court:

(1) The consent order in effect was an agreement between the appellant and the respondents, not between their counsels or solicitors. Generally, the consent of the parties are expressed D and communicated through their respective solicitors, duly appointed to represent them. If there are clear indications that the consent order was recorded without the authority or knowledge of the parties or any of them (as in the present case) then, as an agreement, there was no *consensus* E *ad idem* and the validity of the said consent order could always be challenged and ultimately be set aside. (para 13)

(1a) The appellant herein could make an application to set the consent order aside at the same court which recorded the F consent judgment. There was no necessity to file a fresh separate proceeding for that purpose. The court may in appropriate circumstances set aside the consent order even though it had been sealed and perfected. In such a situation, the court has the power to interfere with and set G aside such a consent order even if the lack of consent on the part of the appellant or the limitation of counsel's authority was unknown to the other side. (para 14)

(2) The solicitors purportedly acting for and on behalf of the H appellant, Jeyakuhan from Messrs Rastam Singa & Co had no *locus standi* to represent the appellant and to record the consent order on behalf of the appellant by withdrawing the appellant's claim. The appellant had initially appointed the firm of Messrs Scott & Kuhan to act on its behalf. The said I firm had been dissolved on 20 January 2009, long before the consent order was recorded. There was no notice of change

of solicitors filed by Messrs Rastam Singa & Co pursuant to the mandatory rule under O. 64 r. 1 of the Rules of the High Court 1980. (para 16)

(3) The non-filing and serving of a notice of change of solicitors in the context of the facts of the present case was not a mere irregularity which could be construed as a technical non-compliance of the Rules, but something more serious than that. Non-compliance of O. 64 r. 1 of the RHC 1980 would have occasioned a substantial miscarriage of justice. Order 64 r. 1 is absolutely unambiguous. Adherence of this order would enable the court and all the relevant parties to a proceeding to identify both the previous and new solicitors acting for a party, and side lining or separating anyone else without distinctive authority. (para 17)

(4) There was a clear indication that the appellant actually never wanted to withdraw its claim against the respondents and wanted to proceed with the case. The appellant's cause of action in tort had accrued since the year 1999 and the limitation period of six years under s. 6(1) of the Limitation Act 1953, had lapsed when this action was withdrawn on 8 July 2009. Even though the action had been withdrawn with liberty to file afresh, the appellant was no longer entitled to re-file the action afresh in court due to the issue of limitation. Therefore, the appellant was seriously prejudiced if the said consent order was not set aside. (para 22)

(5) The learned judge had erred in failing to consider relevant considerations in coming to her decision in this case. In the interest of justice and on the balance of justice, it would be fair, just and proper for this court to set aside the said consent order in order to prevent grave injustice to the appellant. (para 23)

Bahasa Malaysia *Translation Of Headnote*

Perayu memfailkan tindakan terhadap responden-responden dan menuntut gantirugi untuk, antara lain, melanggar tanggungjawab dan pencerobohan. Pada 20 January 2009, firma peguamcara Messrs Scott & Kuhan yang mewakili perayu dibubarkan dan peguam yang menangani perkara itu, satu J. Jeyakuhan terus mengamal di firma baru Messrs Rastam Singa & Co. Apabila kes

A diperbicarakan pada 8 Julai 2009, Jeyakuhan yang mendakwa bahawa beliau masih bertindak bagi pihak perayu, memberitahu mahkamah bahawa kedua-dua pihak telah bersetuju untuk perayu menarikbalik kes. Perayu, walaubagaimanapun, berhujah bahawa beliau tidak pernah memberi arahan atau kuasa kepada Jeyakuhan
B atau Messrs Rastam Singa & Co untuk bertindak bagi pihaknya dan untuk menarikbalik tindakan dengan kebebasan untuk memfailkan semula. Perayu kemudiannya mendakwa bahawa Messrs Rastam & Singa tidak pernah dilantik oleh perayu dan firma tersebut tidak pernah memfailkan notis penukaran
C peguamcara untuk bertindak untuk perayu di dalam tindakan tersebut. Perayu berhujah bahawa penarikan balik tuntutan perayu akan memprejudiskan perayu kerana perayu tidak akan mampu untuk membuat tuntutan sekali lagi terhadap responden-responden kerana kausa tindakan dalam tort dihalang statut memandangkan
D had tempoh enam tahun telah luput. Perayu kemudiannya melantik firma guaman baru, Messrs Sidek Teoh Wong & Dennis, untuk bertindak bagi pihaknya dan memfailkan permohonan untuk mengenepikan perintah persetujuan tersebut. Mahkamah Tinggi, dalam menolak permohonan perayu, mendapati bahawa
E pengetahuan peguam-peguam adalah pengetahuan pelanggan iaitu perayu di dalam kes ini; oleh itu yang arif hakim memutuskan bahawa penegasan perayu bahawa beliau tidak mempunyai pengetahuan mengenai perintah persetujuan tidak boleh dipertahankan. Perayu oleh itu merayu.

F

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

G **(1)** Perintah persetujuan adalah persetujuan di antara perayu dan responden-responden, dan bukan antara peguam-peguam. Pada amnya, persetujuan di antara pihak-pihak dinyatakan dan disampaikan melalui peguam-peguam masing-masing, yang dilantik dengan sewajarnya untuk mewakili mereka. Jika
H terdapat tanda-tanda jelas bahawa perintah persetujuan direkodkan tanpa kebenaran atau pengetahuan pihak-pihak atau mana-mana dari mereka (seperti di dalam kes ini), maka sebagai suatu persetujuan, tidak terdapat *consensus ad idem* dan keesahan perintah persetujuan tersebut sentiasa boleh dicabar dan akhirnya diketepikan.

I

(1a) Perayu di sini boleh membuat permohonan untuk mengenepikan perintah persetujuan di mahkamah yang sama yang merekodkan perintah persetujuan. Tiada keperluan untuk memfailkan prosiding berasingan yang baru bagi tujuan itu. Mahkamah boleh dalam keadaan yang sesuai mengenepikan perintah persetujuan walaupun ia telah dimeterai dan disempurnakan. Dalam keadaan sedemikian, mahkamah mempunyai kuasa untuk campurtangan dan mengenepikan perintah persetujuan walaupun kekurangan persetujuan dari pihak perayu atau had kuasa pihak peguam tidak diketahui pihak lagi satu.

(2) Peguam-peguam yang dikatakan bertindak untuk dan bagi pihak perayu, Jeyakuhan dari Messrs Rastam Singa & Co, tidak mempunyai *locus standi* untuk mewakili perayu dan untuk merekodkan perintah persetujuan bagi pihak perayu dengan menarikbalik tuntutan perayu. Perayu pada mulanya melantik Messrs Scott & Kuhan untuk bertindak bagi pihaknya. Firma guaman tersebut telah dibubarkan pada 20 Januari 2009, sebelum perintah persetujuan direkodkan. Tiada notis penukaran peguamcara difailkan oleh Messrs Rastam Singa & Co selaras dengan peraturan mandatori di bawah A. 64 k. 1 Kaedah- Kaedah Mahkamah Tinggi 1980.

(3) Ketiadaan pemfailan dan penyampaian notis penukaran peguamcara di dalam konteks fakta kes ini bukan hanya satu luar aturan yang boleh ditafsirkan sebagai ketidakpatuhan peraturan teknikal Kaedah-Kaedah, tetapi dari itu lebih serius. Ketidakpatuhan A. 64 k. 1 KMT 1980 boleh menyebabkan salahlaksana keadilan yang besar. Arahan 64 k. 1 adalah sangat jelas. Kepatuhan perintah ini membolehkan mahkamah dan pihak-pihak yang relevan kepada prosiding untuk mengenal pasti peguamcara terdahulu dan yang baru bagi sesuatu pihak, dan mengenepikan dan mengasingkan sesiapa sahaja yang tidak mempunyai kuasa yang tersendiri.

(4) Terdapat petunjuk yang jelas bahawa perayu tidak pernah mahu menarik balik tuntutannya terhadap responden-responden dan ingin meneruskan kes. Kausa tindakan perayu dalam tort telah terakru sejak tahun 1999 dan tempoh had enam tahun di bawah s. 6(1) Akta Had Masa 1953 telah luput apabila tindakan ini ditarikbalik pada 8 Julai 2009. Walaupun tindakan telah ditarikbalik dengan kebebasan memfailkan semula, perayu tidak lagi berhak untuk

memfailkan semula tindakan di mahkamah disebabkan isu had. Oleh itu, perayu sememangnya diprejudiskan jika perintah persetujuan tersebut tidak diketepikan.

(5) Yang arif hakim khilaf apabila gagal mempertimbangkan beberapa pertimbangan relevan apabila membuat keputusan di dalam kes ini. Demi kepentingan keadilan dan atas imbangan keadilan, ia adalah adil, patut dan betul untuk mahkamah ini mengenepikan perintah persetujuan tersebut untuk mencegah berlakunya ketidakadilan yang teruk kepada perayu.

Case(s) referred to:

Concrete Engineering Products Bhd v. Merces Builders Sdn Bhd & Anor [2004] 2 CLJ 531 HC ***(refd)***

Huddersfield Banking Co Ltd v. Henry Lister & Son Ltd [1895] 2 Ch 273 ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng (f) & Yap Wan Chuan & 9 Ors [1996] 2 CLJ 185 SC ***(refd)***

Marsden v. Marsden [1972] 2 All ER 1162 ***(refd)***

S Pakianathan v. R K Stallard [1977] 1 LNS 111 FC ***(refd)***

Sathivel Alagarsamy v. Lakshmi Vellasamy [1998] 3 CLJ Supp 343 HC ***(refd)***

Stewart v. Complex [1990] 107 NBR 407 ***(refd)***

Waitemata City Council v. Mackenzie [1988] 2 NZLR 242 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)

Rules of the High Court 1980, O. 64 r. 1

Other source(s) referred to:

Halsbury's Laws of England, 3rd edn, para 74, p 51

White Book (The Supreme Court Practice), 1979, part 2, p 607

For the appellant - Justin Voon (Alvin Lai with him); M/s Sidek Teoh Wong & Dennis

For the respondents - KB Tan; M/s KB Tan, Kumar & Partners

[Appeal from High Court, Shah Alam; Suit No: MT4-22-278-2002]

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JCA:

[1] On 24 April 2002, the appellant (who was the plaintiff in the court below) filed an action against the respondents (who were the defendants in the court below) claiming damages for breach of

duty of care and trespassing by the respondents and damages for the loss of rights as the developer for quiet employment of the land in question. The writ and the statement of claim were filed by Messrs Scott & Kuhan, as the solicitors acting on behalf of the appellant.

[2] At the close of pleadings, the court fixed 8-10 July 2009 as the trial date for the case. Parties were duly informed of the trial dates.

[3] On 20 January 2009, the said firm of solicitors, Messrs Scott & Kuhan was dissolved and the lawyer who was handling the matter in that firm Mr J Jeyakuhan has since practiced in a new firm known as Messrs Rastam Singa & Co. This was never made known to the appellant at the material time.

[4] When the case came up for trial on 8 July 2009, Mr Jayakuhan claimed to be still acting on behalf of the appellant (even after the said firm of Messrs Scott Kuhan was dissolved on 20 January 2009) had attended court and informed the court that "pihak-pihak bersetuju plaintif menarik balik kes dengan kebebasan untuk memfailkan semula dengan tiada perintah bagi kos" (ie, both parties had agreed for the plaintiff to withdraw the case with liberty to file afresh and with no order as to costs) and the solicitors for the respondents agreed. On that day, the court recorded that "kes dibatalkan dengan kebebasan untuk memfailkan semula dan tiada perintah tentang kos atas persetujuan" (ie, the case is struck out with liberty to file a fresh and with no order as to costs by consent).

[5] On 28 July 2009 Messrs Rastam Singa & Co, had by letter informed the appellant that the action was purportedly withdrawn "upon direction of the court" and not withdrawn by the appellant with liberty to file afresh. From the notes of proceedings available in the court's file, it is clear that, the order was made "by consent of both parties".

[6] The appellant contended that it had never given any instruction or authority to Mr Jeyakuhan or Messrs Rastam Singa & Co to act on its behalf and to withdraw the action with liberty to file afresh. Further, on 8 July 2009, the firm Messrs Scott & Kuhan was already dissolved and there was actually no existing legal firm to represent the appellant in the court at that time. The appellant further claimed that Messrs Rastam & Singa was never appointed by the appellant and the said firm had never filed any

notice of change of solicitors to act for the appellant in the said action. In short the appellant claimed that the said Mr Jeyakuhan from Messrs Rastam Singa & Co simply had no *locus standi* and authority to represent the appellant on 8 July 2009, when the said action was withdrawn with liberty to file a fresh.

[7] The withdrawal of the appellant's claim on 8 July 2009, even with liberty to file afresh, would severely prejudice the appellant. The appellant will not be able to refile the claim afresh against the respondents on the ground that the cause of action in tort would be statute barred as its six years limitation period had lapsed.

[8] The appellant then appointed a new firm of solicitors namely Messrs Sidek Teoh Wong & Dennis to act on its behalf. A notice of change of solicitors was filed in the court. The appellant then filed an application *vide* encl. 27 (summons in chambers dated 22 October 2009) in order to set aside the said consent order recorded on 8 July 2009. On 7 July 2010 the learned High Court judge dismissed the appellant's application (encl. 27) with no order as to costs. The appellant is appealing against the said order of dismissal and the respondents are cross-appealing against the order of no costs in favour of the respondents.

[9] The respondents averred that there was no inequitable conduct on the part of the respondents to induce the appellant into entering the said consent order. The respondents submitted that the issue whether Mr Jeyakuhan was still the solicitor acting on behalf of the appellant when the said consent order was entered into, is not a concern for the respondents' solicitors; this is especially so when Mr Jeyakuhan had been acting for the appellant since year 2000 in the earlier suit. The respondents also submitted that there is no evidence to show that the respondents either by themselves or through their solicitors had forced, coerced or made any representation to the appellant for the consent order to be recorded. The respondents also submitted that the appellant has failed to proffer a reason in any of its affidavits as to why it was not present in court on the date of the hearing if it had not intended for the said consent order to be entered on that date when full trial had been fixed for three consecutive days starting from 8 July 2009 ie, the date when the consent order was entered into.

[10] In dismissing the appellant's application in encl. 27, the learned High Court judge found that the knowledge of the solicitors is the knowledge of the client ie, the appellant in this case; therefore the learned judge found that the appellant's averment that it has no knowledge of the consent order cannot stand. The learned judge also held that it was irrelevant whether or not the solicitors in agreeing to the consent order had acted in accordance with his client's instruction. The learned judge was of the view that lack of authorization on the part of the solicitors cannot affect the 3rd party ie, respondents herein; and the appellant should take an action against its solicitors for professional negligence and not to prejudice the respondents. Finally, the learned judge ruled that an order cannot be said to be null and void if there is no element of illegality or lack of jurisdiction.

A B C D

Setting Aside Of Consent Order

[11] The complaint of the appellant before us is that the consent order recorded on 8 July 2009 is not valid and had asked the court to set it aside. An order of a court is always deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside. It is a well established principle that a perfected consent order can only be set aside in a fresh action filed for the purpose. However, in a situation where grave injustice was caused to the appellant, the law allows the court of the first instance to set aside the consent order even though it has been sealed and perfected.

E F

[12] A consent order is an order of the court carrying out an agreement between the parties. It is well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside (see: *Huddersfield Banking Co Ltd v. Henry Lister & Son Ltd* [1895] 2 Ch 273, 283). In this respect, Peh Swee Chin, FCJ in *Khaw Poh Chhuan v. Ng Gaik Peng (f) & Yap Wan Chuan & 9 Ors* [1996] 2 CLJ 185, p. 213 had ruled that "it is elementary that the first requisite of a contract is that the parties should have reached agreement which would involve an offer and acceptance of the offer, *inter alia*". There must be *consensus ad idem* existing between the parties ie, the appellant and the respondents, for the consent order to be recorded on 8 July 2009.

G H I

[13] The consent order in effect is an agreement between the appellant and the respondents, not between their counsels or solicitors. Generally the consent of the parties are expressed and communicated through their respective solicitors, duly appointed to represent them. If there are clear indications that the consent order was recorded without the authority or knowledge of the parties or any one of them (as in the present case) then, as an agreement, there is no *consensus ad idem* and the validity of the said consent order can always be challenged and the consent order can ultimately be set aside, particularly where the effect of which, if not set aside, would cause grave injustice to the party in question.

[14] In a situation of grave injustice as in the present case, the appellant can make an application to set the consent order aside at the same court which recorded the consent judgment. There is no necessity to file a fresh separate proceeding for that purpose. The court may in appropriate circumstances set aside the consent order even though it has been sealed and perfected. In such a situation the court has the power to interfere with and set aside such a consent order even if the lack of consent on the part of the appellant or the limitation of counsel's authority was unknown to the other side. The said consent order should not be allowed to remain. This principle was adopted by the Federal Court in the *Khaw Poh Chhuan* case following the decision of the Court of Appeal in England, in *Marsden v. Marsden* [1972] 2 All ER 1162.

[15] In the present case, when the application in encl. 27 was filed by the appellant on 22 October 2009, the appellant had only received the sealed order dated 8 July 2009 from the respondent's solicitors on 28 October 2009, which was six days after the application was filed by the appellant. The application was filed "either contemporaneously or sometime before" the sealed order is extracted and served on the appellant (similar to the situation in *Marsden v. Marsden*). The court can entertain such an application. It seems to be a manifest injustice to the appellant, to exclude its application from consideration on the basis that it may not have made it before the order was perfected. In *Marsden v. Marsden (supra)* it was held in effect, as indicated in the 1979 *White Book (The Supreme Court Practice)* Part 2 at p. 607, that:

> Where a party applies to have a consent order set aside on the ground that it was made without his consent and the application is made either before or contemporaneously with its being perfected, the court has a discretion to set aside the order where grave injustice would be done by allowing it to stand.

(The above passage was adopted by the Federal Court in *S Pakianathan v. RK Stallard* [1977] 1 LNS 111). A

[16] The learned solicitors purportedly acting for and on behalf of the appellant, Mr Jeyakuhan from Messrs Rastam Singa & Co has no *locus standi* to represent the appellant and to record the consent order on behalf of the appellant by withdrawing the appellant's claim on the relevant date 8 July 2009. The appellant had initially appointed the firm of Messrs Scott & Kuhan to act on its behalf. The said firm had been dissolved on 20 January 2009, long before the consent order was recorded. There was no notice of change of solicitors filed by Messrs Rastam Singa & Co pursuant to the mandatory rule under O. 64 r. 1 of the Rules of the High Court 1980 (RHC 1980). B C

[17] The non-filing and serving of a notice of change of solicitor in the context of the facts of the present case was not a mere irregularity which could be construed as a technical non-compliance of the rules, but something more serious than that. Non-compliance of O. 64 r. 1 of the RHC 1980 would have occasioned a substantial miscarriage of justice. Order 64 r. 1 is absolutely unambiguous. Adherence of this order will enable the court and all the relevant parties to a proceeding to identify both the previous and the new solicitors acting for a party, and side-lining or separating anyone else without distinctive authority, a stranger. The latter possessing no legal standing and unrecognized by anyone, can never be accorded any *locus standi*, and any contribution unless waived must remain void, (see: *Concrete Engineering Products Bhd v. Merces Builders Sdn Bhd & Anor* [2004] 2 CLJ 531). D E F

[18] Order 64 r. 1, must be complied with. It is a mandatory requirement. The new counsel or firm of solicitors has *locus standi* to appear on behalf of his clients only upon filing the requisite notice of change of solicitors. It is trite law that upon service of any court process a litigant can elect either to conduct a case entirely in person or to entrust the case entirely to his counsel or solicitors. Order 64 r. 1 prescribes the requisite notice that must be filed to give counsel the necessary standing. It is only upon the filing of that requisite notice that counsel has an authority to appeal on their client's behalf, and to enter into a compromise, subject of course to any express limitation imposed on that authority by the client. G H I

(See: *Sathivel Alagarsamy v. Lakshmi Vellasamy* [1998] 3 CLJ Supp. 343)

In the absence of proof that a notice of change of solicitors on the appointment Messrs Rastam Singa & Co had been filed on behalf of the appellant, the court finds that the consent order entered into by Mr Jeyakuhan from that firm on behalf of the appellant on 8 July 2009 is clearly not valid and upon application by the appellant, must be set aside.

[19] In a situation like in the present case where the solicitors purportedly acting for the appellant was without authority to enter into a consent order and the solicitors of the respondents did not know about the limitation, *Halsbury's Laws of England* (3rd edn.) p. 51, para. 74 states as follows:

> The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the ordinary unlimited authority. In some cases, where the matter is within the ordinary authority of counsel, the courts have refused to inquire whether there was any such limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel. But the true rule seems to be that in such case the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side.

[20] Again, the Federal Court in *Khaw Poh Chhuan* case had also ruled that "even if lack of consent was unknown to the other side, the court has the power to interfere with such consent order where grave injustice would be could by allowing the consent order to remain."

[21] The authorities cited above clearly show that there is inherent jurisdiction in a court of first instance to set aside a consent order that it has made and which has been entered where it is clearly shown that a party did not in fact consent to the order granted. (See: *Stewart v. Complex* [1990] 107 NBR 407; *Waitemata City Council v. Mackenzie* [1988] 2 NZLR 242 – New Zealand Court of Appeal).

Grave Injustice To The Appellant

[22] The issue of grave injustice is an important consideration in an application to set aside a consent order. In the present case there is a clear indication that the appellant actually never wanted to withdraw its claim against the respondents and wanted to proceed with the case. The appellant's cause of action in tort had accrued since the year 1999 and the limitation period of six years under s. 6(1) of the Limitation Act 1953, has lapsed when this action was withdrawn on 8 July 2009. Even though the action had been withdrawn with liberty to file afresh, the appellant is no longer entitled to refile the action afresh in court due to the issue of limitation. Therefore the appellant is seriously prejudiced if the said consent order is not set aside. By contrast, the respondents will not be seriously prejudiced if the said consent order is set aside because the respondents were ready to defend the appellant's action at any time as the respondents themselves had previously agreed for the appellant's action to be filed afresh.

Conclusion

[23] Based on the above considerations we are of the view that the learned judge had erred in failing to consider relevant considerations in coming to her decision in this case. In the interest of justice and on the balance of justice, it would be fair, just and proper for this court to set aside the said consent order in order to prevent grave injustice to the appellant.

[24] We therefore, allow the appeal with costs of RM5,000 to the appellant and order that the whole of the consent order dated 8 July 2009, recorded by the High Court including the part that relate to 'no order as to costs' the subject matter of the cross-appeal by the respondents be set aside. We also make an order that the deposit is to be refunded to the appellant.